

No. 16305 /

United States
Court of Appeals
for the Ninth Circuit

RUBY HUMPHREYS, Administratrix of the
Estate of William Orvie Humphreys, Deceased,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon.

FILED

FEB 19 1959

PAUL P. O'BRIEN, CLERK

No. 16305

United States
Court of Appeals
for the Ninth Circuit

RUBY HUMPHREYS, Administratrix of the
Estate of William Orvie Humphreys, Deceased,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer	7
Attorneys, Names and Addresses of	1
Bond for Costs on Appeal	16
Certificate of Clerk	20
Complaint	3
Docket Entries	18
Motion to Dismiss	10
Motion to Extend Time Filed November 3, 1958	17
Order Re	17
Motion to Extend Time Filed December 3, 1958	18
Order Re	18
Motion to Show Cause	11
Affidavit of Humphreys, Ruby	12
Notice of Appeal	15
Order of Dismissal	10
Order Overruling Motion to Show Cause	14
Statement of Points	23

NAMES AND ADDRESSES OF ATTORNEYS

SPITZBERG, BONNER, MITCHELL & HAYS,
STEELE HAYS,

825 Pyramid Life Bldg.,
Little Rock, Arkansas;

LUVAAS, COBB & RICHARDS,
JOE B. RICHARDS,

307 Eugene Legal Center,
858 Pearl Street,
Eugene, Oregon,

For Appellant.

C. E. LUCKEY,

United States Attorney, for the District of
Oregon;

ROBERT R. CARNEY,

Assistant United States Attorney, for the Dis-
trict of Oregon,

United States Courthouse,
Portland, Oregon,

For Appellee.



In the District Court of the United States
for the District of Oregon

Civil No. 9258

RUBY HUMPHREYS, Administratrix of the
Estate of William Orvie Humphreys, Deceased,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Comes Now the plaintiff and for cause of action
against the defendant, complains and alleges as fol-
lows:

I.

This action arises under the Act of Congress of
June 25, 1948, Ch. 646, Sec. 1346; 62 Stat. 992;
U.S.C., Title 28, Sec. 1346 as amended by the Act of
Congress of April 25, 1949, Ch. 92, Sec. 2 (a); 63
Stat. 62; U.S.C., Title 28, Sec. 1346; and as further
amended by the Act of Congress of May 24, 1949,
Ch. 139, Sec. 80 (a, b); 63 Stat. 101; U.S.C., Title
28, Sec. 1346, as hereinafter more fully appears.

II.

That plaintiff, during all times herein mentioned,
was and now is a bona fide resident and citizen of
the State of Oregon, within the jurisdiction of the
above-entitled court. That plaintiff is the duly ap-
pointed, qualified and acting administratrix of the

estate of William Orvie Humphreys, deceased, and is bringing this action on behalf of herself as widow and the minor children of the deceased: James, 13; William L., 11; Thomas, 10; Robert, 6; Jerry, 5; Rachael, 2.

III.

That during all times herein mentioned the United States Department of Agriculture, Administrative Subdivision of the United States of America, through its Forest Service Department, did maintain a lookout and fire prevention station at Cove Mountain Lookout, ten miles southeast of Plainview, Arkansas.

IV.

That on the 24th day of May, 1956, Richard Humphreys, the brother of the deceased, William Orvie Humphreys, entered into an agreement with the defendant whereby Richard Humphreys was to clean out a well, 47 feet in depth, at Cove Mountain Lookout and in the performance of said work did inhale certain poisonous gasses located in the bottom of the well and did call out for help. That pursuant to this summons for assistance, the decedent William Orvie Humphreys did enter into the well and attempted to rescue and remove Richard Humphreys from the well. That as a result of the inhalation of said gasses both Richard Humphreys and Orvie Humphreys succumbed and died.

V.

That as a result of said attempted rescue and as a result of the negligence of the defendant as herein-

after set forth the said William Orvie Humphreys received severe injuries which resulted in his death on May 24, 1956. That at the time of his death, William Orvie Humphreys was 37 years of age, with the normal life expectancy of 28.53 and earning and capable of earning not less than \$4,500.00 a year. That by virtue of his death, the surviving widow and next of kin have suffered damages therefore in the sum of \$84,000. As approximate result of the death, William Orvie Humphreys and of the defendant's negligence set forth above, the plaintiff was compelled to and did incur and pay funeral expenses in the sum of \$400.00.

VI.

That said accident and the injuries and damages suffered by the decedent were proximately caused by the careless and negligent acts of John H. Lancaster, employee of the defendant, in the following particulars:

(a) In failing to advise Richard Humphreys or William Orvie Humphreys that there had been a known leakage of poisonous gasses in the well on other previous occasions.

(b) In failing to provide a safe method of ingress and egress to the bottom of the well.

(c) In failing to station other persons on the ground at the top of the well to assist persons out of the well in the event of an emergency.

VII.

That Arkansas Statutes, Sections 27.903 and 27.904 provide that an action for death may be maintained by the personal representative, or if none exists, by an heir, for the benefit of the widow and next of kin.

VIII.

The Constitution of the State of Arkansas, Article V, Section 32, provides that damages for death may not be limited.

IX.

That at and prior to the time of said accident, the said John Lancaster was acting within the scope of his employment as a lookout station operator of the United States Forest Service, an agency of the defendant. That the death of William Orvie Humphreys resulted from the negligence of the defendant's said employee under circumstances where the United States, if a private person, would be liable to plaintiff for damage and injury in accordance with the laws of the State of Arkansas.

X.

Plaintiff has retained Luvaas & Cobb as her attorneys to represent her in this cause, and a reasonable compensation for their services, to be paid out of, and not in addition to, the sum of the judgment, would be twenty per cent (20%) of the amount of plaintiff's recovery herein.

Wherefore, Plaintiff demands judgment against defendant in the sum of \$84,000 together with costs, and prays that the court fix and allow attorney's

fees of twenty per cent (20%) of the amount recovered.

LUVAAS & COBB,

By /s/ JOE B. RICHARDS,
Attorneys for Plaintiff.

Duly Verified.

[Endorsed]: Filed July 10, 1957.

[Title of District Court and Cause.]

Civil No. 9258

ANSWER

Comes now the defendant, United States of America, by C. E. Luckey, United States Attorney for the District of Oregon, and Robert R. Carney, Assistant United States Attorney, and for answer to the complaint on file herein alleges:

First Defense

The venue of this action does not lie in the United States District Court for the District of Oregon, but on the contrary, venue lies, if the suit is maintainable at all, in the United States District Court for the Eastern District of Arkansas, for the following reasons, to wit:

1. This is a civil action on a tort claim against the United States under subsection (b) of Section 1346 of Title 28, USCA.

2. That plaintiff brings this action as the personal representative of the decedent, William Orvie Humphreys, who at the time of his death was a resident of Hollis, Arkansas.

3. That the act or omission complained of in plaintiff's complaint occurred in the Eastern District of Arkansas.

Second Defense

1. Defendant admits the allegations contained in Paragraphs I, II and III of the complaint.

2. Defendant admits that part of Paragraph IV of the complaint which alleges that on May 24, 1956, Richard Humphreys, the brother of the deceased William Orvie Humphreys, entered into an agreement with the defendant whereby Richard Humphreys was to clean out a well, but denies all other allegations of Paragraph IV.

3. The defendant denies the allegations contained in Paragraphs V and VI of the complaint and particularly denies that the plaintiff was damaged in any sum whatever.

4. Defendant admits Paragraphs VII and VIII of the complaint.

5. Defendant admits that part of Paragraph IX of the complaint which alleges that at and prior to the time of said accident, the said John Lancaster was acting within the scope of his employment as a lookout station operator of the United

States Forest Service, an agency of the defendant, but denies all other allegations of Paragraph IX.

6. Defendant admits the allegations contained in Paragraph X of the complaint.

Third Defense

Any injuries sustained or suffered by plaintiff's decedent at the time and place and on the occasion mentioned in the complaint were caused in whole or in part, or were contributed to, by the negligence or fault or want of care of the plaintiff, and not by any negligence or fault or want of care on the part of this defendant.

Wherefore, defendant having fully answered plaintiff's complaint herein, prays that plaintiff take nothing by his action and that the complaint be dismissed and held for nought, and that defendant be given judgment for its costs and disbursements incurred herein.

C. E. LUCKEY,

United States Attorney,

District of Oregon;

/s/ ROBERT R. CARNEY,

Assistant United States Attorney.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 4, 1957.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes Now the plaintiff by her attorneys, Luvaas, Cobb & Richards, and move the court for an order herein dismissing the above-entitled action without prejudice and without costs to either party and states that it is the intention of the plaintiff that this action be refiled in the State of Arkansas for the convenience of the parties and their witnesses.

Dated this 26th day of March, 1958.

LUVAAS, COBB & RICHARDS,

By /s/ JOE B. RICHARDS,
Attorneys for Plaintiff.

Approved:

C. E. LUCKEY,
United States Attorney;

By /s/ ROBERT R. CARNEY,
Assistant United States At-
torney.

[Endorsed]: Filed March 31, 1958.

[Title of District Court and Cause.]

ORDER OF DISMISSAL

Based Upon Plaintiff's Motion to Dismiss, as approved by counsel for the defendant,

It Is Hereby Ordered, Adjudged and Decreed that the above-entitled cause be and the same hereby is dismissed without prejudice and without costs to either party.

Dated this 31st day of March, 1958.

/s/ WILLIAM G. EAST,
Judge.

[Endorsed]: Filed March 31, 1958.

[Title of District Court and Cause.]

MOTION

Comes Now the plaintiff, pursuant to an Affidavit attached hereto, and moves the above-entitled court for an order requiring the above-named defendant to show cause in the District Court of the United States, for the District of Oregon, why said court should not set aside its order dismissing the above-entitled cause without prejudice and order that said action for damages be reinstated.

This motion is made in good faith and is founded upon *Hastings Mfg. Co. vs. Federal Trade Commission*, 153 F. 2d 253; *Morse vs. Bragg*, 107 F. 2d 647, and *United States vs. Sixty-five cases of Glove Leather*, 254 Fed. 211.

Dated this 13th day of June, 1958.

LUVAAS, COBB & RICHARDS,

By /s/ JOE B. RICHARDS,
Attorneys for Plaintiff.

[Title of District Court and Cause.]

AFFIDAVIT

State of Oregon,
County of Lane—ss.

I, Ruby Humphreys, being first duly sworn depose and say:

That I am the plaintiff in the above-entitled action and I have a good cause of action for damages as shown by the Complaint on file herein.

That heretofore and on the 31st day of March, 1958, the above-entitled action was dismissed without prejudice and without costs to either party. That this dismissal was taken for the sole purpose of permitting my attorneys, Spitzberg, Bonner, Mitchell & Hays of Little Rock, Arkansas, to refile this action in the District Court of the United States, Eastern District of Arkansas, Western Division, for the convenience of the parties and their witnesses, the death for which damages are sought having occurred within the geographical boundaries of said district.

That my attorneys in Arkansas failed to file this action within the two-year Statute of Limitations applicable to said action. That the death of William Orvie Humphreys occurred May 24, 1956, and the action for damages was not commenced in the District Court of the United States, Eastern District of Arkansas, Western Division, until May 27, 1958.

That I believe the ends of justice will be preserved if I am allowed to reinstate my action for damages in the District Court of the United States for the District of Oregon and then have the action transferred to the District Court of the United States, Eastern District of Arkansas, Western Division, which latter court is a more convenient forum for the trial of the issues of fact in said cause.

/s/ RUBY HUMPHREYS.

Subscribed and Sworn to before me this 13th day of June, 1958.

[Seal] /s/ JOE B. RICHARDS,
Notary Public for Oregon.
My Commission Expires 8-14-59.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 18, 1958.

In the United States District Court
for the District of Oregon

Civil No. 9258

RUBY HUMPHREYS, Administratrix of the
Estate of William Orvie Humphreys, Deceased.

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER

This matter having come on regularly for hearing on June 30, 1958, pursuant to the Court's order requiring the defendant, United States of America, to show cause why this Court should not set aside its Order of Dismissal, without prejudice, dated March 31, 1958, and allow plaintiff's action to be reinstated, the plaintiff appearing by her attorney Joe B. Richards, and the government appearing by Robert R. Carney, Assistant United States Attorney, and the Court having heard argument of counsel and considered the memorandum of authorities submitted and being fully advised in the premises;

It Is Hereby Ordered, Adjudged and Decreed that plaintiff's motion for an order setting aside the Order of Dismissal without prejudice, dated March 31, 1958, and reinstating the above-entitled action, be and the same hereby is denied.

Dated this 1st day of August, 1958, at San Diego,
California.

/s/ WILLIAM G. EAST,
United States District Judge.

A True Copy from Photostat Records of Court.

R. DeMOTT,
Clerk.

By /s/ M. SPARGO,
Deputy.

[Endorsed]: Filed August 4, 1958.

[Title of District Court and Cause.]

Civil No. 9258

NOTICE OF APPEAL

Notice Is Hereby Given that the above-named plaintiff hereby appeals to the United States Court of Appeals for the Ninth Circuit from that order dated the 1st day of August, 1958, denying plaintiff's motion for an order setting aside the Order of Dismissal without prejudice dated March 31, 1958, and refusing to reinstate the above-entitled action.

/s/ JOE B. RICHARDS,
Of Attorneys for Appellant
Ruby Humphreys.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 26, 1958.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents: That we, Ruby Humphreys, Administratrix of Estate—William Orvie Humphreys, Deceased, as Principal, and United States Fidelity and Guaranty Company, a corporation, duly incorporated under the laws of the State of Maryland, of Baltimore, Maryland, having an office and usual place of business at,

as Surety, are held and firmly bound unto United States of America in the sum of Two Hundred Fifty and no/100 Dollars (\$250.00), lawful money of the United States of America, to be paid to the said United States of America, heirs, executors, administrators, successors or assigns, for which payment well and truly to be made and done we bind ourselves, our heirs, executors, administrators, successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 24th day of September, 1958.

Whereas, the aforesaid Principal is filing notice of appeal to the Court of Appeals of the United States for the Ninth Circuit from the judgment of the District Court of the United States for the Oregon Division of the Judicial District of in the said suit or proceeding.

Now the Condition of This Obligation Is Such, That if the said Appellant shall pay the costs if the appeal is dismissed or the judgment is affirmed

or such costs as the Appellate Court may award if the judgment is modified, then this obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in the presence of:

[Seal] UNITED STATES FIDELITY
AND GUARANTY COMPANY,

By /s/ GORDON PERLICH,
Attorney-in-Fact.

[Endorsed]: Filed September 26, 1958.

[Title of District Court and Cause.]

MOTION TO EXTEND TIME

Comes Now the plaintiff-appellant, by and through one of her attorneys, Joe B. Richards, and respectfully requests that the above-entitled Court extend the time for filing the record on appeal and docketing appeal for an additional 40 days.

Dated this 31st day of October, 1958.

/s/ JOE B. RICHARDS,
Of Attorneys for Appellant
Ruby Humphreys.

It Is So Ordered.

Dated November 3, 1958.

/s/ WILLIAM G. EAST,
United States District Judge.

[Endorsed]: Filed November 3, 1958.

[Title of District Court and Cause.]

MOTION TO EXTEND TIME

Comes Now the plaintiff-appellant, by and through one of her attorneys, Joe B. Richards, and respectfully requests that the above-entitled Court extend the time for filing the record on appeal and docketing appeal for an additional 10 days.

Dated this 3rd day of December, 1958.

/s/ JOE B. RICHARDS,
Of Attorneys for Appellant
Ruby Humphreys.

[Endorsed]: Filed December 3, 1958.

ORDER

So Ordered this 4th day of December, 1958.

/s/ WILLIAM G. EAST,
United States District Judge.

[Endorsed]: Filed December 4, 1958.

[Title of District Court and Cause.]

DOCKET ENTRIES

1957

July 10—Filed Complaint.

July 10—Issued Summons—to Marshal.

July 12—Filed Summons—with Marshal's return.

1957

Sept. 24—Filed Stipulation for extension of time to answer.

Sept. 24—Filed and Entered Order allowing extension of time for defendant to answer to and including October 1, 1957.

Oct. 4—Filed Answer.

1958

Mar. 31—Filed Motion of plaintiff to dismiss without prejudice.

Mar. 31—Filed and Entered Order dismissing without prejudice.

June 18—Filed Plaintiff's Motion for Order to Show Cause to issue.

June 18—Filed and Entered Order to Show Cause. Set for hearing June 30, 1958, at 11 a.m.

June 30—Record of hearing on order to show cause; under advisement.

Aug. 1—Entered Order denying plaintiff's motion to set aside order of dismissal without prejudice and to reinstate case.

Aug. 4—Filed above order denying plaintiff's motion to set aside order of dismissal, etc.

Sept. 26—Filed Plaintiff's Notice of Appeal.

Sept. 26—Filed Plaintiff's Bond for Costs on Appeal.

Sept. 26—Certified copy of Notice of Appeal mailed C. E. Luckey, U. S. Attorney.

Nov. 3—Filed Plaintiff's motion for extension of time to docket appeal.

1958

- Nov. 3—Filed and entered order extending time an additional 40 days to docket appeal.
- Dec. 3—Filed Plaintiff's motion for extension of time to docket appeal.
- Dec. 4—Filed and entered order (on motion) extending time 10 days after Dec. 15, 1958, to docket appeal.
- Dec. 10—Filed Appellant's Designation of Record on appeal.
- Dec. 17—Filed Appellant's Amended Designation of Record on Appeal.

In the United States District Court
for the District of Oregon

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint, Answer, Motion to Dismiss, Order of Dismissal, Motion to Show Cause, with Affidavit Attached, Certified copy of Order Overruling Motion to Show Cause, Notice of Appeal, Bond for Costs on Appeal, Motion to Extend Time for Docketing Appeal, and Order thereon, Motion to Extend Time for Docketing Appeal Additional Ten Days, and

Order thereon, Amended Designation of Record, and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 9258, in which Ruby Humphreys, Administratrix of the Estate of William Orvie Humphries, Deceased, is the plaintiff and appellant, and the United States of America is the defendant and appellee; that the said record on appeal has been prepared by me in accordance with the designations of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 17th day of December, 1958.

[Seal]

R. DeMOTT,
Clerk.

By /s/ MILDRED SPARGO,
Deputy.

[Endorsed]: No. 16305. United States Court of Appeals for the Ninth Circuit. Ruby Humphreys, Administratrix of the Estate of William Orvie Humphreys, Deceased, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal From the United States District Court for the District of Oregon.

Filed: December 19, 1958.

Docketed: December 29, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Civil No. 16305

RUBY HUMPHREYS, Administratrix of the
Estate of William Orvie Humphreys, Deceased,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

STATEMENT OF POINTS

Comes the Appellant and states, pursuant to Rule 17 (6) of the United States Court of Appeals for the Ninth Circuit, that she intends to rely upon the following points in making this appeal:

1. That the Court erred in overruling the Motion to Show Cause.

2. That the Court abused its discretion in refusing to permit the Appellant's cause of action to be reinstated by granting the Motion to Show Cause.

SPITZBERG, BONNER,
MITCHELL & HAYS,

By /s/ STEELE HAYS,
Attorneys for Appellant.

[Endorsed]: Filed January 21, 1959.

